JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.202214 of 2018

M/s Starlet Innovations (Pvt.) Ltd.

Versus

Federation of Pakistan & others

J U D G M E N T

Date of Hearing.	15-10-2018
PETITIONERS BY:	Kh. Farooq Saeed, Mr. Abdullah Akhtar Butt and Mr. Shahid Sharif, Advocates.
RESPONDENTS BY:	Mr. Abdul Waheed Khan, Advocate for respondents. Mr. Tahir Mahmood Ahmad Khokhar, D.A.G.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 seeks a declaration that the notices dated 18.10.2017 and 19.01.2018 (**impugned notices**) issued under Section 177 of the Income Tax Ordinance, 2001 (**Ordinance, 2001**) are *ultra vires* and without lawful authority. By the impugned notices, the petitioner has been required to produce record/ documents/ books of accounts and has been informed that the case of the petitioner for the tax year 2012 has been selected for audit under Section 177 of the Ordinance, 2001.

2. The learned counsel for the petitioner argues that the petitioner files its statement under Section 115(4) of the Ordinance, 2001 as an importer, manufacturer and exporter of footwear and is covered by presumptive tax regime under Section 154 of the Ordinance, 2001. In short, the statement filed by the

petitioner would constitute full and final discharge of its tax liability. In a nub, the case of the petitioner is that being covered by the presumptive tax regime and entitled to filing a statement in terms of 115(4) the petitioner was neither required to file a return of income under Section 114 of the Ordinance nor its accounts could be audited under the provisions of section 177.

3. Having heard the learned counsel for the parties, it is apparent that the arguments raised by the learned counsel for the petitioner are flawed and do not compel this Court to hold that the impugned notices have been issued without lawful authority.

4. In the first instance, the petitioner relies upon a judgment of this Court reported as *Messrs Arshad Corporation (Pvt.) Ltd. through General Manager Finance Federal Board of Revenue, Islamabad and 2 others* (**2016 PTD 1168**) and the following observations in that judgment:

> *"15. It can be seen from a reading of the provision reproduced above that section 120 has its genesis in and relates to the filing or failure thereof, of a return of income. It merely gives the Commissioner the power to issue notice to the taxpayer in case the return of income furnished is not complete. Obviously, it presupposes that a person is, in law, required to file a return of income in terms of section 114. Section 120 relates to the filing of return under section 114 and the consequences flowing therefrom. The provisions of section 120 are not relatable to the filing of the statement under section 115(4) of the Ordinance and thus the invocation of the provisions of section 120 by the Assistant Commissioner Inland Revenue was erroneous and ultra vires. It may be pointed out that section 114 of the Ordinance obliges certain persons to furnish a return of income for a tax year. The petitioners admittedly are not classified as the persons included in the ambit of section 114.*

> *Therefore, the provisions of section 120 cannot be called in aid by the respondents to declare the statement filed by the petitioners as invalid. Section 120(4) of the Ordinance does not have any nexus with the provisions of section 115(4) and it was otiose and unlawful for the Assistant Commissioner Inland Revenue to rely upon it in order to base the impugned order. Likewise, the notice under subsection (4) of section 114 of the Ordinance is also ultra vires the powers of the Assistant Commissioner in the case of the petitioners since that provision vests the Commissioner with the power to issue notice to require any person to file a return of income and who has failed to do so to furnish a return of income for that year. The least that was required of the respondent-department to issue an order under section 120 as also to issue a notice in terms of section 114(4) of the Ordinance was to determine as a fact that the liability of the petitioners was not the final liability and the deduction so made from the proceeds of export was not the final tax in terms of section 115(4) of the Ordinance. The impugned orders, the impugned notices issued to the petitioners are without lawful authority and of no legal effect."*

5. It can be seen that the issue in the cited precedent did not relate to a challenge to a notice in terms of section 177 of the Ordinance, 2001 and the challenge in that case was to an order passed under Section 120(4). It was under these circumstances that it was held that the case of the petitioner was not covered by any of the provisions of section 120 as the petitioner was merely filing a statement under Section 115 and thus the invoking of the provisions of section 120 was unlawful. This precedent is therefore not relevant for the purposes of determining the controversy in the instant petition.

6. Next the learned counsel for the petitioner placed reliance on another reported judgment of the Peshawar High Court viz. *Northern bottling Company (Pvt.) Ltd. Industrial Estate, Peshawar v. Federation*

of Pakistan (**2013 PTD 1552**). In that judgment it was held that:

> *"…After substitution of section 177 vide Finance Act, 2010 the power to select a case for audit of tax affairs of any person earlier available to the Commissioners were taken away and now only the Board is empowered to select any person or class of persons for audit of tax affairs through computer ballot. The Commissioner is only empowered to conduct audit of the cases selected by Board through computer ballot. It would not be out of place to mention here that after substitution of section 177 vide Finance Act, 2010 the Commissioners are again misreading the provision by self-assumption of jurisdiction to select and conduct cases of the tax payers for audit. The learned counsel for the department has failed to show that any computer ballot has been conducted by the FBR. The intent of the legislators to select cases for audit through computer ballot on random or parametric basis by the FBR is very clear that there should be no discrimination or misuse of power by any tax official. In this background, how it can be expected that the FBR would hold any computer balloting at the back of the taxpayers."*

7. It is at once apparent from a reading of the portion of the Peshawar High Court judgment that the High Court was of the view that power to select a case for audit of income tax affairs vesting in the Commissioners was taken away by the insertion of section 214-C in the Ordinance, 2001 vide Finance Act, 2010 and therefore the Commissioners did not have the powers to conduct the audit on their own. However, this judgment is *per incuriam* since it was rendered in early 2013 and by Finance Act, 2013 explanation was added to section 214-C whereby it was clarified that the powers of the Commissioner under Section 177 were independent from the powers of the Board and were not restricted in any manner. This explanation has been upheld by a Division Bench of this Court in *The Federal Board of Revenue etc. v.*

M/s Chenone Stores Ltd. (**2018 PTD 208**) and while declaring the explanation to section 214-C of the Ordinance, 2001 to be *intra vires* held that the Commissioners had the power to conduct audit independent of the Board and these powers could not be circumscribed by the courts.

8. The learned counsel for the petitioner has not referred to any provision including section 177 which prohibits the conduct of audit in the case of an assessee like the present petitioner which files a statement under Section 115 and not a return of income under Section 114 of the Ordinance, 2001. Therefore, any challenge on that basis is without any lawful justification and the impugned notices cannot be struck down being invalid and illegal.

9. Section 169(3) and section 154(4), read together, makes the statement under sub-section (4) of section 115 to be an assessment order. It recites that:

> *"(4) Any person who is not obliged to furnish a return for a tax year because all the person's income is subject to final taxation under sections 5, 6, 7, 148, 151 and 152, sub-section (3) of section 153, sections 154, 156 and 156A, sub-section (3) of section 233 or sub-section (3) of section 234A shall furnish to the Commissioner a statement showing such particulars relating to the person's income for the tax year in such form and verified in such manner as may be prescribed."*

10. The petitioner agrees that it is an exporter and the tax required to be deducted is a final tax under sub-section of section 154 on the income from which it was deductible. Thus in the case of the petitioner, sub-section (3) of section 169 is triggered and upon filing of the statement, assessment shall be treated to have

been made under section 120 and shall be taken to be an assessment order for the purposes of the Ordinance. Yet, the petitioner considers itself immune from the applicability of section 177 and beyond its mischief merely on the hypothesis that the tax deductible under Section 154 is the final tax on the income.

11. However, this argument is too fantastic to find favour with this Court. To reiterate, the statement so filed by the petitioner shall be deemed to be an assessment order under Section 120. The tax being final tax on the income of a person merely absolves that person of the obligation to file a return of income and no more. It does not follow that that person's income tax affairs are no more prone to audit proceedings. There is no scope for inference in this regard and if this were the case, the legislature would have created an exception with specificity. None has been provided. Section 177, so far as relevant, provides that:

> *"**177. Audit.—**[1][(1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any other law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person"*

12. The crucial words are "conducting audit of the income tax affairs of the person". The term "person" has been defined in section 80 and it is not the case of

the petitioner that it does not fall within that definition. Thus, for audit to be conducted, any person is liable to be proceeded against irrespective of whether he files a return under section 114 or a statement in terms of section 115.

9. Nevertheless the petitioner will have the benefit of the observations made in paragraph 23 of the Division Bench judgment in *FBR v. Chenone Stores* and only in case the said notices offend those observations and the holding of the Division Bench of this court. None was pointed out by the learned counsel for the petitioner during the course of the arguments.

10. In view of the above, the instant petition is without merit and is, therefore, ***dismissed.***

(SHAHID KARIM)
JUDGE

Approved for reporting.

JUDGE

⋆

Rafaqat Ali